IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted]

No. [redacted] 249

WYATT TEE WALKER, MARTIN LUTHER KING, JR., RALPH ABERNATHY, A. D. KING, J. W. HAYES, T. L. FISHER, F. L. SHUTTLESWORTH and J. T. PORTER,

Petitioners,

—v,—

CITY OF BIRMINGHAM, a Municipal Corporation of the State of Alabama,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above entitled cause December 9, 1965, *infra,* p. 30a, rehearing denied January 20, 1966, *infra,* p. 32a.

Citations to Opinions Below

The opinion of the Supreme Court of Alabama is reported at —— Ala. ——, 181 So.2d 493 (1965), and is printed in the Appendix hereto, *infra,* pp. 8a-29a. The opinion of the Circuit Court for the Tenth Judicial Circuit of Alabama (Jefferson County) is unreported, but is printed in the Appendix hereto, *infra,* pp. 1a-7a.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered December 9, 1965, *infra,* p. 30a. Motion for rehearing was denied by the Supreme Court of Alabama January 20, 1966, *infra,* p. 32a. Petitioners' time for filing petition for writ of ceritorari was extended to and including June 19, 1966 by an order signed by Mr. Justice Black on April 13, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

I. Whether petitioner's convictions for contempt for alleged disobedience of an *ex parte* injunction restraining certain protest demonstrations against racial segregation violate the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment on the ground that:

A. The injnnction was unconstitutional because,

1. The terms of the injunctive decree were impermissibly vague;

2. The injunction enforced an ordinance punishing parades without permits which is unconstitutional on its face and as applied on due process and equal protection grounds;

3. The trial court improperly excluded evidence bearing on the unconstitutional administration of the parade ordinance;

B. There was no evidence that petitioners violated the terms of the injunction's prohibition against "unlawful" parades and demonstrations?

II. Whether the court below was correct in holding that even if the injunction unconstitutionally restrained free expression, petitioners could be held in contempt for failure to obey it?

III. Whether petitioners M. L. King, Jr., Abernathy, Walker and Shuttlesworth were denied due process by being punished in part because of constitutionally protected statements to the press criticizing the *ex parte* injunction and Alabama officials?

IV. Whether petitioners Hayes and Fisher were denied due process by conviction without any evidence that they had notice of or knowledge of the terms of the injunction?

Constitutional and Statutory Provisions Involved

1. This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following ordinance of the City of Birmingham, a municipal corporation of the State of Alabama:

General Code of City of Birmingham, Alabama (1944), §1159

It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

3. The following Alabama statutes and Birmingham municipal ordinances involved are set out in the Appendix, *infra*, pp. 33a to 35a:

Code of Alabama (Recompiled 1958), Title 13, §§4, 5, 9;

General Code of City of Birmingham, Alabama (1944), §§369, 597;

Building Code of City of Birmingham, Alabama (1944), §2002.1

Statement

A. *General Background*

These cases involve judgments of contempt adjudicated against petitioners by the Circuit Court of Birmingham,

Alabama, for peaceful protest demonstrations against racial segregation on two occasions, contrary to an *ex parte* injunction ordering them to refrain from "unlawful" parades, and for allegedly speaking in a contumacious manner about the court which issued the injunction. The case involves, of course, certain discrete acts of petitioners. But these acts have limited meaning unless seen in their historical context. Petitioners, therefore, introduce this Statement by reference to officially documented facts which put the issue in perspective.

In early 1963, Birmingham Negroes appealed to the public conscience through peaceful protest demonstrations in an effort to secure redress of their grievances, since other avenues were severely limited. Only 11.7% of Negroes of voting age were registered to vote in 1962 in Jefferson County (Birmingham), despite long-standing suits against voting discrimination by the United States and private individuals.[1] This situation was reflected in the fact that no Negroes were employed as city police officers, tax officials, government lawyers, court officials, officials in the public health or public works department in the City of Birmingham, except in the performance of maintenance, janitorial or similar duties (R. 188). A "self-proclaimed white supremacist, Eugene ("Bull") Connor," was Commissioner of Public Safety, the head of the police department and one of the three governing commissioners of the City.[2]

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[1] *1963 Report of the United States Commission on Civil Rights* (Government Printing Office, 1963), p. 32.

[2] *Congress and the Nation 1945-1964: A Review of Government and Politics in the Postwar Years* (Congressional Quarterly Service, 1965), p. 1604.

Segregation of the white and Negro races was enforced by law in virtually every aspect of public life in Birmingham.[3] Municipal ordinances provided for segregation in restaurants, places of entertainment, and sanitation facilities.[4] *Gober* v. *Birmingham*, 373 U.S. 374 (1963), decided following events involved in the instant case, held that enforcing the municipal segregation ordinances through trespass convictions denied equal protection of the laws. No Negroes attended schools with whites in Birmingham or elsewhere in Alabama during the school year 1962-63.[5] In June 1963, just after the Birmingham demonstrations, at the University of Alabama (Tuscaloosa) Governor George C. Wallace carried out his 1962 campaign pledge "to stand in the schoolhouse door" to prevent integration of Alabama's schools, in the face of a federal court order.[6]

But despite the fact that an appeal to conscience through peaceful protests against legally enforced segregation was

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[3] Alabama had enacted sweeping racial segregation laws which were applicable in Birmingham. In *United States* v. *State of Alabama*, 252 F. Supp. 95, 101 (M.D. Ala. 1966), Circuit Judge Rives pointed out in 1966 that "there are still forty-four sections of the Alabama Code dedicated to the maintenance of segregation." The opinion recounts many aspects of the official policy of segregation and cites the statutes and cases.

[4] Birmingham municipal ordinances provided, among other things, that places for the serving of food (§369 General Code), places for the playing of certain games (§597 General Code), and toilet facilities (§2002-1 Building Code) must be segregated (R. 110). These ordinances are printed in the Appendix hereto, *infra*, p. 33a.

[5] *1963 Report of the United States Commission on Civil Rights, supra*, p. 65.

[6] *Congress and the Nation 1945-1964, supra*, p. 1601.

an appropriate response to the situation, the United States Civil Rights Commission concluded in its 1963 Report that:

> The official policy in . . . Birmingham, throughout the period covered by the Commission's study, was one of suppressing street demonstrations. While police action in each arrest may not have been improper, the total pattern of official action, as indicated by the public statements of city officials, was to maintain segregation and to suppress protests. The police followed that policy and they were usually supported by local prosecutors and courts.[7]

Referring to the Birmingham situation, President Kennedy in June 1963 submitted a broad civil rights program to the Congress which became the Civil Rights Act of 1964. The President addressed the American people in a nationwide television address and made "an appeal to conscience —a request for their cooperation in meeting the growing moral crisis in American race relations."[8]

B. *Events Leading to the City of Birmingham's Prayer for Injunction*

Petitioners Wyatt Tee Walker, Martin Luther King, Jr., Ralph Abernathy, A. D. King, J. W. Hayes, T. L. Fisher, F. L. Shuttlesworth and J. T. Porter are members and

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[7] *1963 Report of the United States Commission on Civil Rights, supra,* p. 112.

[8] United States House of Representatives, Committee on the Judiciary, 88th Congress, 1st Session, *Hearings on Civil Rights,* Part II, pp. 1446-1447. In his message to the Congress, the President said:

> "The venerable code of equity law commands 'for every wrong, a remedy.' But in too many communities, in too many parts of the country, wrongs are inflicted on Negro citizens for which no effective remedy at law is clearly and readily available. State and local laws may even affirmatively seek to deny the rights to which these citizens are fairly entitled—"

officers of the Alabama Christian Movement for Human Rights and/or the Southern Christian Leadership Conference, which seek to eliminate racial segregation through constitutionally protected activities such as free speech and picketing, through the courts, and other legal means (R. 260, 361, 385). An Alabama Department of Public Safety investigator assigned to "racial" problems testified that the organizations' "teachings have been non-violent" (R. 276), and "the general theme is non-violence in every program" (R. 277).

Objecting to legally enforced racial segregation in the City of Birmingham described above, these organizations began a program of peaceful protests in April 1963 which were part of the series described above. Some protests took the form of sit-ins in the face of the Birmingham ordinance requiring segregation in eating establishments.[9]

Other protests took different form. Officers of the organizations, aware that city officials might view some of these protests as "parades" requiring city permits,[10] on several occasions attempted to secure permits. Mrs. Lola

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[9] On April 5, 1963, several Birmingham Negro citizens seated themselves at the lunch counter in Lane's Drug Store, a business establishment open to the general public; the waitress asked if she could help them and each ordered a cup of coffee. Shortly thereafter the manager appeared with a city police officer who arrested them for "trespass after warning" (R. 113-114). A similar incident occurred the same day, when four Negro citizens of Birmingham sought service at the Tutwiler Hotel Coffee Shop (R. 115-116).

On April 9, several Negro citizens entered the Bohemian Bakery, a business establishment open to the general public, obtained food in the cafeteria line and seated themselves. Shortly thereafter the store manager appeared with some city policemen. One officer said, "What should we charge them with?"; another answered, "Trespass"; and another said, "Give them disorderly conduct, too." Each member of the group was ordered to rise and was searched; they were arrested and taken to city jail (R. 116-117).

[10] See text of §1159, General Code of City of Birmingham, *supra*, pp. 3-4.

Hendricks, a member of the Alabama Christian Movement for Human Rights, authorized by its president, Rev. Shuttlesworth, on April 3, 1963, went to the Police Department and asked to see the person in charge of issuing permits, and was directed to Police Commissioner Eugene ("Bull") Connor's office in City Hall. When Commissioner Connor received her, she said, "We came up to apply or see about getting a permit for picketing, parading, demonstrating," and asked if he could issue the permit, or refer her to other persons who would issue it. Commissioner Connor replied, "No you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the city jail." He repeated that twice (R. 418-421).

On April 5, Rev. Shuttlesworth, President, and N. H. Smith, Secretary, of the Alabama Christian Movement, sent a telegram to Police Commissioner Connor at City Hall, requesting "a permit to picket peacefully against the injustices of segregation and discrimination in the general area of Second, Third and Fourth Avenues on the east and west sidewalks of 19th Street on Friday and Saturday April Fifth and Sixth. We shall observe the normal rules of picketing. Reply requested" (R. 412-416, 484). Commissioner Connor replied that he could not grant such permits since this was the responsibility of the entire City Commission and said, "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama" (R. 352-355, 484).

Petitioners offered to prove below that the City Commission never issued permits for parades or marches; that these were, in fact, issued by the City Clerk at the request of the Traffic Department without authority of statute or ordinance (R. 344-348, 354). The Court, however, ruled that since the law required action by the Commission, it was not relevant to show whether the Commission in fact

followed the statutory procedure and refused to hear the proof (R. 348-350).

On April 6, at about 12:30 P.M., about 42 persons left the Gaston Motel in Birmingham and walked two abreast towards the City Hall to petition the city government for redress of grievances. They were orderly and obeyed all traffic signals. Police officers stopped them and inquired whether they had a parade permit. Upon answering "No", they were arrested for "parading without a permit" and taken to the city jail (R. 112-113). April 7, at about 4 P.M., a similar incident occurred (R. 111-112). April 10, at about noon, about ten Negro citizens walked together towards City Hall carrying picket signs, intending to picket peacefully to protest the city's segregation policy. The Chief of Police stopped them before they reached City Hall, asked whether they had a permit to picket; upon saying they did not, he arrested them (R. 118-119).

Petitioners offered evidence below on the question of how the permit statute was applied, to show that it was being applied discriminatorily against them. However, Chief Inspector W. J. Haley of the Birmingham Police Department, was not allowed to answer the question "Isn't what is customarily known as parades something with bands and signs and—?" (R. 234), or the question "Have you in your twenty-odd years of experience, yourself, do you know of your own knowledge of any other group of people similarly situated being arrested for parading without a license?" (R. 232). Inspector Haley had seen school children marching in two's to the auditorium or to the museum or to the City Hall, but did not believe this constituted a parade and did not challenge them for parading without a permit (R. 234). He implied that what made petitioners' processions "parades" was that the leaders (clergymen) were dressed in robes (R. 234). Haley stated

that some parades were considered "legal" in Birmingham, but petitioners were not permitted by the court to ascertain what types of parades were allowed (R. 233).

C. *The Injunction*

On April 10, the City of Birmingham filed an *ex parte* bill for injunction against petitioners in the Circuit Court for the Tenth Judicial Circuit of Alabama, Equity Division, Jefferson County (R. 65-82). The City alleged that from April 3 through April 10, petitioners sponsored and participated in "sit-in" demonstrations, "trespasses" or "invasions" into the lunch counters of business establishments where food is served to customers, street processions with the intent to march on City Hall without a permit, and picketing places of business (R. 70-72), and that one man in a crowd "attacked a police dog of the City of Birmingham, a member of the Canine Corps" (R. 72). The City alleged that "the present acts and conduct of the respondents [petitioners] hereinabove alleged, is a part of a massive effort by respondents [petitioners] and those allied or in sympathy with them to forcibly integrate all business establishments, churches, and other institutions of the City of Birmingham" (R. 73).[11]

The bill for injunction was presented to W. A. Jenkins, Jr., Circuit Judge of the Tenth Judicial Circuit of Alabama, without notice to petitioners, at 9:00 P.M., April 10 (R. 65-84, 120); a temporary injunction immediately issued enjoining petitioners from:

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[11] The City also alleged, as the basis for injunctive relief, that "the said actions and conduct aforesaid are calculated to cause and if allowed to continue will likely cause injuries or loss of life to Police Officers of the City of Birmingham and have caused and will likely to continue to cause damage to property owned by the City of Birmingham in the operation of its Police Department and will continue to be an undue burden and strain upon said Police Department" (R. 73).

Engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or like demonstrations without a permit, trespass on private property after being warned to leave the premises by the owner or person in possession of said private property, congregating on the street or public places into mobs, and unlawfully picketing business establishments or public buildings in the City of Birmingham, Jefferson County, State of Alabama or performing acts calculated to cause breaches of the peace in the City of Birmingham, Jefferson County, in the State of Alabama or from conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations, unlawful boycotts, unlawful trespasses, and unlawful picketing or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama or from doing any acts designed to consummate conspiracies to engage in said unlawful acts of parading, demonstrating, boycotting, trespassing and picketing or other unlawful acts, or from engaging in acts and conduct customarily known as "kneel-ins" in churches in violation of the wishes and desires of said churches (R. 76-77).

D. *Continuation of Peaceful Protests Against Segregation*

After the City of Birmingham obtained the injunction, petitioners Martin Luther King, Jr., Shuttlesworth, Abernathy and Walker issued a public statement (in the form of a press release) on April 11, saying in part:

> In our struggle for freedom we have anchored our faith and hope in the rightness of the Constitution and the moral laws of the universe. . . . However we are now confronted with recalcitrant forces in the Deep

> South that will use the courts to perpetuate the unjust and illegal system of racial separation. Alabama has made clear its determination to defy the law of the land. Most of its public officials . . . have openly defied the desegregation decision of the Supreme Court. We would feel morally and legal responsible to obey the injunction if the courts of Alabama applied equal justice to all of its citizens. . . . We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process. We do this not out of any disrespect for the law but out of the highest respect for *the* law. . . . Out of our great love for the Constitution of the U.S. and our desire to purify the judicial system of the state of Alabama, we risk this critical move with an awareness of the possible consequences involved (R. 305-307, 482-483).

On Good Friday (April 12) and Easter Sunday (April 14) some of the petitioners participated in peaceful protest demonstrations against segregation. On both occasions they notified city police in advance to aid them in the performance of their duties (R. 231, 235, 269-271) and police appeared at the protests (R. 406-407). Police did not permit automobiles containing white persons, nor any white pedestrians, to enter the predominantly Negro residential area where the protest demonstrations were to begin (R. 210, 225).

On both Good Friday and Easter Sunday some of the petitioners and about 50 to 60 others left church after midday services, walking in orderly fashion two by two on the sidewalk. They had informed city officials that they intended to proceed to City Hall. They were joined by sev-

eral hundred others who had been permitted by the police to congregate near the church (R. 209-210, 219, 223, 231, 235, 262-263, 284-285). Those who came from church walked in columns of two's; those who joined them were not in columns but walked abreast, children in front, older people behind (R. 225). No band played, nor were there any uniformed persons among the walkers (R. 330-331), nor were there any placards (R. 230). They did not cross against red lights or violate traffic regulations (R. 216). Police described them as orderly, and said that at all times they had the situation under control; and that law and order were maintained (R. 216, 219, 238, 332, 357).

On both occasions persons in the walk from the churches including petitioners, were arrested within a few blocks of the church, and charged with parading without a permit in violation of §1159.

E. *Contempt Judgment: How the Federal Questions Were Raised and Decided Below*

On April 15, petitioners filed a "motion to dissolve injunction and/or application for stay of execution pending hearing," in which they asserted that the injunction denied them due process of law under the Fourteenth Amendment because it was issued without notice to them, because it was excessively vague, because it was a prior restraint on free speech protected by the First Amendment, because it was designed to enforce segregation, because it was based upon a complaint which described only constitutionally protected conduct, and because the ordinance upon which it was based was excessively vague (R. 100-119). Petitioners also filed a demurrer (R. 176-178), an answer (R. 178-180), and an amended answer (R. 186-189) to the bill for in-

junction in which they raised similar constitutional claims. After petitioners filed their motion to dissolve the injunction, the City of Birmingham filed a motion for an order to show cause why petitioners should not be held in contempt for violating the *ex parte* temporary injunction (R. 119-144). The court ruled that even though petitioners had filed their motion to dissolve first, it would consider the City of Birmingham's show cause order for contempt first (R. 194-195).

In response to the City of Birmingham's show cause order for contempt, petitioners filed a "motion to discharge and vacate order and rule to show cause" saying that they had not violated the injunction because it prohibited engaging in or encouraging others to engage in "unlawful" conduct, specified therein, whereas the petitioners' conduct was lawful conduct protected by the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Petitioners also said that the original bill for injunction upon which the temporary injunction was based did not show that they had engaged in unlawful conduct but that they had engaged in conduct protected by the First and Fourteenth Amendments (R. 181-182).

In their answer to the show cause order, petitioners described the lawful conduct protected by the First and Fourteenth Amendments in which they had engaged:

a) Walking two abreast in orderly manner on the public sidewalks of Birmingham observing all traffic regulations with prior notice having been given to city officials in order to peacefully express their protest against continuing racial discrimination in Birmingham.

b) Peaceful picketing in small groups and in orderly manner of publicly and privately owned facilities.

c) Requesting service in privately owned stores open to the general public in exercise of their right to equal protection of the laws and due process of law which are denied by Section 369 of the 1944 General City Code of Birmingham (R. 184-185).

At the contempt hearing petitioners offered evidence on the issue of what constituted activity falling within the ban on parading without a permit, to show that this rule was applied discriminatorily against petitioners in violation of their rights to equal protection under the Fourteenth Amendment. The court excluded the evidence, saying "I think the only question was did they or did they not have a permit" (R. 232-234).

Petitioners also offered evidence that they requested a "parade" permit which was denied arbitrarily, in violation of the Fourteenth Amendment. This was excluded on the ground that they had not followed the statutory procedure for obtaining permits (R. 420-421).

Petitioners offered to prove that the statutory procedure was in fact never followed, and that it would be a denial of equal protection of the laws secured by the Fourteenth Amendment to require petitioners to follow it (R. 344-348, 354). The Court ruled this was not relevant, and refused the offer (R. 348-350). The Court refused an offer of proof that there were no published rules and regulations prescribing the manner in which permits are actually obtained (R. 350).

Petitioners offered to prove that parade permits were freely given to white persons under similar circumstances and for similar activities, which denied petitioners' Four-

teenth Amendment rights. The court refused this offer (R. 344-355, 232-234).

Petitioners offered to prove that the purpose of their activities was to protest against unconstitutional racial discrimination by exercising the right of free speech protected by the First and Fourteenth Amendments; this was refused (R. 360).

After presentation of the City of Birmingham's evidence during the hearing on the show cause order, petitioners filed a "motion to exclude testimony against all respondents [petitioners]" (R. 190-191) in which they asserted that there was no evidence showing why they should be punished for contempt based on "the statements made publicly at press conferences and mass meetings on April 11, 1963," since the evidence showed that they had "engaged only in activity protected by the First Amendment and by the due process clause of the Fourteenth Amendment to the Constitution of the United States." Petitioners T. L. Fisher and J. W. Hayes asserted that there was no evidence showing that they were served with copies of the court's injunctive order of April 10, 1963, prior to their arrest and imprisonment for parading without a permit on April 12 or April 14, 1963 (R. 191).

The court said that the basis of the show cause order, charging contempt, was the issuance of the press release containing allegedly derogatory statements about Alabama courts and, particularly, the injunctive order of that court, and petitioners' participation in alleged parades in violation of the permit ordinance (R. 475-476). In response to petitioners' claim that their acts were lawful because constitutionally protected by the First and Fourteenth Amendments, and that the order enjoining peaceful protests was void because it enforced Section 369 of the 1944 Code of Birmingham requiring segregation in eating facilities, the

Court said the parade ordinance "is not invalid upon its face as a violation of the constitutional rights of free speech as afforded to these defendants in the absence of a showing of arbitrary and capricious action upon the part of the Commission of the City of Birmingham in denying the defendants a permit to conduct a parade" (R. 476-478). The Court held petitioners in contempt (R. 478) and sentenced them to 5 days in jail and $50 fines (R. 480).

In petition for certiorari to the Supreme Court of Alabama, petitioners made substantially the same claims as below, asserting that the judgment of contempt denied rights secured by the First and Fourteenth Amendments in that the punishment constituted a prior restraint on freedom of speech, association, and the right to petition for redress of grievances; that the injunction was excessive and vague, contrary to the due process clause of the Fourteenth Amendment, particularly in the context of an order restraining First Amendment rights; and that the City of Birmingham failed to produce evidence which showed that petitioners did anything other than exercise constitutional rights of free expression, and that, therefore, the contempt decree was based on no evidence of guilt, in violation of the due process clause of the Fourteenth Amendment (R. 24).

The Alabama Supreme Court held that because petitioners admittedly continued protest demonstrations after the injunction issued, they violated the order against engaging in parades without permit (R. 512-514). The Court said, "Petitioners rest their case on the proposition that Section 1159 of the General City Code of Birmingham, which regulates street parades, is void because it violates the First and Fourteenth Amendments of the Constitution of the United States, and, therefore, the temporary injunction is void as a prior restraint on the constitutionally

protected rights of freedom of speech and assembly" (R. 515). The Court held that "the circuit court had the duty and authority, in the first instance, to determine the validity of the ordinance, and, until the decision of the circuit court is reversed for error by orderly review, either by the circuit court or a higher court, the orders of the circuit court based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be punished," and therefore affirmed petitioners' convictions for contempt (R. 522).

REASONS FOR GRANTING THE WRIT

I.

Petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment were infringed by their conviction for contempt where the injunction they are charged with disobeying is in violation of their First and Fourteenth Amendment rights.

Petitioners contend that suppressing their protests against racial segregation violated constitutional guarantees. The *ex parte* injunctive order of April 10, 1963 (R. 76-77), the city ordinance prohibiting parades without permits which underlies the injunction (General City Code, 1944, Section 1159, *supra,* pp. 3-4), and the judgment of contempt (R. 475-480), violated First and Fourteenth Amendment guarantees of free speech and assembly. The case presents important issues of free assembly, speech and petition for redress of grievances in the context of the total racial segregation policy of Birmingham in 1963. This Court has reviewed other cases involving similar ques-

tions and has recognized the public importance of the issues.[12]

The case comes here three years after the events because the Alabama Supreme Court kept it under advisement from August 22, 1963 (R. 499), until December 9, 1965. But the use of state court injunctive and criminal process to suppress peaceable assembly continues to present public questions of first importance.

The trial court rejected petitioners' constitutional attack on the injunction and the parade permit ordinance on the merits (R. 477-478), and held petitioners in contempt for disobedience of an order enjoining "unlawful parades" and parades without permits provided for in City Code §1159. (The trial court also apparently found some petitioners in contempt for issuing a statement at a press conference which was allegedly disrespectful and in defiance of the court's authority. See part III, *infra*.)

On certiorari the Alabama Supreme Court held that petitioners might be punished for disobeying the injunction, whether or not the injunction violated their constitutional rights, relying upon its interpretation of *United States* v. *United Mineworkers*, 330 U.S. 258 (20a-25a). With that view of the law, the court found it unnecessary to discuss the validity of the injunctive order and constitutional objections pressed by petitioners. Nor did the court below mention petitioners' defense that their conduct did not violate the injunction because the order prohibited "unlawful parades" and their conduct was not "unlawful," but was constitutionally protected.

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[12] Between 1961 and 1965, this Court passed on more than 30 cases involving sit-in demonstrations. During recent years the Court also passed on numerous cases involving protest marches as in *Edwards* v. *South Carolina*, 372 U.S. 229, and *Cox* v. *Louisiana*, 379 U.S. 536.

In the discussion which follows, we first urge that the injunctive order of April 10, 1963, and §1159 are both unconstitutional and violate petitioners' constitutional rights to free speech and assembly on various grounds including Fourteenth Amendment vagueness and equal protection claims. Second, we urge that there was no evidence of an "unlawful" parade forbidden by the injunction, and hence no evidence of guilt within the doctrine of *Thompson* v. *Louisville*, 362 U.S. 199, and *Fields* v. *City of Fairfield*, 375 U.S. 248. Third, we argue that even assuming, *arguendo*, that petitioners did disobey the injunction, the state may not constitutionally punish disobedience of an *ex parte* injunctive order which infringes constitutional rights to free speech and assembly.

A. *The ex parte injunction of April 10, 1963, and Section 1159 of the Birmingham City Code violate petitioners' First and Fourteenth Amendment rights.*

1. *Vagueness of the Injunction's Terms.*

The April 10, 1963, injunction undertook to end all Negro protest against the segregationist regime of Birmingham. The order was issued without notice or hearing on the basis of the City's complaint verified by Public Safety Commissioner Eugene "Bull" Connor, and affidavits of several policemen describing certain demonstrations against discrimination. In broad and sweeping language the order undertook to prohibit, *inter alia*, parades without permits, trespasses after warning, "unlawfully picketing business establishments or public buildings," "unlawful boycotts," and "performing acts calculated to cause breaches of the peace in the City of Birmingham" (R. 76-77).

If this case requires review of all the injunction's prohibitions there should be no doubt of its invalidity. For example, the anti sit-in demonstration provision directly

aided the City ordinance compelling restaurant segregation which this Court referred to in invalidating convictions in *Gober* v. *Birmingham*, 373 U.S. 374, and *Shuttlesworth and Billups* v. *Birmingham*, 373 U.S. 262. The general prohibition against "Acts calculated to cause breaches of the peace" is plainly a vague and overbroad infringement of free speech and assembly. *Edwards* v. *South Carolina*, 372 U.S. 229; *Fields* v. *South Carolina*, 375 U.S. 44; *Henry* v. *Rock Hill*, 376 U.S. 776; and *Cox* v. *Louisiana*, 379 U.S. 536, 544-552.

But the trial court apparently based its contempt finding only on an alleged violation of the portions of the injunction prohibiting certain petitioners[13] "from engaging in, sponsoring, inciting, or encouraging mass street parades or mass procession or like demonstrations without a permit" and from "conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations . . . or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama . . .". The trial court never stated precisely what portion of the order it thought was violated, but rests on the conclusion that petitioners conducted a parade without a permit as well as upon alleged disrespectful remarks at a press conference. There was no apparent reliance upon any theory that petitioners violated the order by any means other than parading without a permit (R. 360):

> The Court: The only charge has been this particular parade, the one on Easter Sunday and the one on

[13] Petitioners J. W. Hays and T. L. Fisher were not named as respondents in the injunction suit, named in the injunction order, or served with copies of the injunction prior to the alleged violation of the order. The separate arguments addressed to this situation are set forth below at pp. 42 to 44.

> Good Friday, and on the question of the meeting at which time some press release was issued. Am I correct in that?
>
> Mr. McBee: Essentially that is correct.
>
> The Court: I don't know of any other evidence or any other occasions other than those, and I see no need of putting on testimony to rebut something where there has been no proof along that line.

The Alabama Supreme Court quotes this statement and says that petitioners did parade or march without a permit contrary to the order (17a-18a).

The order is vague and overbroad insofar as it merely enjoins "unlawful" parades and demonstrations. A general prohibition against "unlawful" parades requires those enjoined to determine at their peril the lawfulness of a proposed parade by reference to the whole body of the law, including applicable constitutional provisions. Where the only guideline is the Constitution those enjoined are left to gauge the full range of legal and factual issues necessary to a decision of whether a particular parade is constitutionally protected. An injunction making the constitutional boundary the line of criminality is obnoxious to all the objections which have led this Court to void statutes which encroached overbroadly on constitutionally protected conduct. First, because the constitutional boundary is obscure and often presents a difficult question, the injunction gives no fair notice, "no warning as to what may fairly be deemed to be within its compass." Mr. Justice Harlan, concurring in *Garner* v. *Louisiana,* 368 U.S. 157, 185; 207; see Note, Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67; 76 (1960), and authorities cited in footnote 51. Second, such a vague proscription is readily susceptible of harsh, im-

proper and discriminatory enforcement. Cf. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433; *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98. Lastly, such an order effectively coerces the citizen to surrender his right to engage in protected protest through fear of punishment for contempt, and thus inhibits free expression. See *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98; *Smith* v. *California*, 361 U.S. 147, 150-151; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286-288; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66-70; *Baggett* v. *Bullitt*, 377 U.S. 360, 378-379; *Dombrowski* v. *Pfister*, 380 U.S. 479, 494.

This general prohibition against "unlawful" parades and demonstrations presents essentially the same question presented by prosecutions under generalized conceptions of breach of the peace in *Edwards* v. *South Carolina*, 372 U.S. 229; *Fields* v. *South Carolina*, 375 U.S. 44; *Henry* v. *Rock Hill*, 376 U.S. 776; and *Cox* v. *Louisiana*, 379 U.S. 536, 544-552. In each case the Court made clear that free speech and assembly may be regulated only by precise and narrowly drawn rules. See also *Cantwell* v. *Connecticut*, 310 U.S. 296; *Terminiello* v. *Chicago*, 337 U.S. 1; *Stromberg* v. *California*, 283 U.S. 359; *Ashton* v. *Kentucky*, ... U.S. ..... (May 16, 1966, 34 U.S. Law Week 4398). And, of course, the fact that the vague proscription emanates from a sweeping judicial edict rather than from a vague legislative enactment cannot save it, because the protections of the Fourteenth Amendment apply with equal force to the judiciary. *N.A.A.C.P.* v. *Button*, 371 U.S. 415; *Thomas* v. *Collins*, 323 U.S. 516; cf. *Shelley* v. *Kraemer*, 334 U.S. 1; *Johnson* v. *Virginia*, 373 U.S. 61; *Hamilton* v. *Alabama*, 376 U.S. 650; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 462.

2. *The Unconstitutionality of §1159 on Its Face and as Applied.*

The injunction's prohibition against parades "without permits" is equally invalid because the applicable permit requirement is in Birmingham City Code §1159 which is unconstitutional on its face, and as applied. Indeed, the Alabama Court of Appeals has held §1159 unconstitutional in a criminal proceeding arising from the same Good Friday walk involved in this case. See *Shuttlesworth* v. *City of Birmingham,* ..... Ala. App. ....., 180 So.2d 114 (1965), (cert. granted by Ala. Sup. Ct., January 20, 1966). Judge Cates wrote that the conviction was invalid on several distinct grounds, viz., because §1159 imposed an invidious prior restraint on free use of the streets; because it lacked ascertainable standards for granting or denying permits; because it was discriminatorily applied contrary to *Yick Wo* v. *Hopkins,* 118 U.S. 356; and because there was insufficient evidence that §1159 was violated by the Good Friday walk on the sidewalks. The City's appeal from that decision is now pending in the Alabama Supreme Court, but the invalidity of §1159 under a host of this Court's decisions is plain.

The ordinance plainly fails to provide meaningful and constitutional standards for granting or denying permits and commits the decision of the right to peaceful use of the streets for protest to the uncontrolled discretion of the licensing officers. Pursuant to §1159 the Birmingham City Commission should grant a permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." The ordinance requires that the applicant state "the purpose for which it [any parade, procession or other public demonstration on the streets] is to be held or had." Thus, by committing to the commissioners the right to

decide, in view of the *purpose* of a demonstration, whether the "public welfare," etc., will be served, the Commissioners are empowered to suppress any protest they disapprove of. The law is unconstitutional on its face under this Court's decision in *Cox* v. *Louisiana,* 379 U.S. 536, 553-558, and the precedents cited therein. As the Court stated in *Cox, supra,* 379 U.S. at 557-558:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

See also, *Schneider* v. *State,* 308 U.S. 147, 163-164; *Lovell* v. *Griffin,* 303 U.S. 444, 447, 451; *Hague* v. *C.I.O.,* 307 U.S. 496, 516; *Largent* v. *Texas,* 318 U.S. 418, 422; *Saia* v. *New York,* 334 U.S. 558, 559-560; *Niemotko* v. *Maryland,* 340 U.S. 268, 271-272; *Kunz* v. *New York,* 340 U.S. 290, 294; and *Staub* v. *Baxley,* 355 U.S. 313, 322-325. Cf. *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 90; *Freedman* v. *Maryland,* 380 U.S. 51, 56.

Cox v. *New Hampshire,* 312 U.S. 569, cited by the trial court, is distinguishable from this case. For in *Cox* there were no "licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Kunz* v. *New York,* 340 U.S. 290, 293-294.

And, of course, the Court has "uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review

in this Court of a judgment of conviction under such an ordinance." *Staub* v. *Baxley*, 355 U.S. 313, 319.

The Alabama Court of Appeals has held that §1159 was discriminatorily applied in reversing the prosecution of petitioner Shuttlesworth for the Good Friday 1963 march. *Shuttlesworth* v. *City of Birmingham*, ... Ala. App. ....., 180 So.2d 114, 136-139 (1965). After analyzing the record in that case and in other prosecutions under the law (in particular, *Primm* v. *City of Birmingham*, 42 Ala. App. 657, 177 So.2d 326 (1964)), Judge Cates concluded that the "pattern of enforcement exhibits a discrimination within the rule of *Yick Wo* v. *Hopkins, supra*" (180 So.2d at 139).

In this contempt proceeding, petitioners made repeated efforts to prove their claim of discriminatory enforcement in violation of the equal protection clause. (See *infra*, pp. 29 to 30). The trial court refused to admit much of the testimony. However, a sufficient showing was made to establish a violation of the equal protection clause in the administration of §1159.

Some parades were considered "legal" and allowed in Birmingham, although the trial court would not allow petitioners to develop what type of parades were permitted (R. 233). Repeated efforts of civil rights demonstrators to obtain permits were rebuffed, although the authorities were advised of their plans by the demonstrators themselves (R. 231, 235, 269, 271) and by police investigators (R. 219-221). When representatives of Rev. Shuttlesworth went to see the person in charge of issuing permits for parading, picketing and demonstrating they were referred to Public Safety Commissioner Eugene "Bull" Connor. Mrs. Lola Hendricks told Connor "We came up to apply or see about getting a permit for picketing, parading, demonstrating" (R. 420), and "asked if he could issue the permit"

or refer her to "persons who would issue a permit." Mr. Connor replied by stating:

> No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail (R. 420).

This evidence is sufficient to invalidate the ordinance and the convictions. Cf. *Lombard* v. *Louisiana,* 373 U.S. 267.

Two days later, Rev. Shuttlesworth sent a telegram to Mr. Connor (R. 484), requesting a permit to picket (R. 484). Mr. Connor wired back that a permit "cannot be granted by me individually but is the responsibility of the entire commission," and then added: "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama" (R. 484).

Mr. Connor's statement to Mrs. Hendricks plainly establishes an arbitrary and capricious administration of the permit law. The refusal to receive an application for a permit or to furnish her with information other than the statement that picketing would not be permitted plainly shows the operation of uncontrolled and abused discretionary power. Mr. Connor did not even seek from Mrs. Hendricks any information as to the time and place of proposed demonstrations, the number of participants or any information relevant to any permissible factors in deciding a permit request. Immediately when confronted with a representative of the Alabama Christian Movement for Human Rights, Connor rejected the request.

As Mr. Justice Black wrote concurring in *Cox* v. *Louisiana, supra,* 379 U.S. at 580-581:

> I believe that the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all.

• • •

> And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.

See also, the concurring opinion of Mr. Justice Clark in *Cox, supra,* 379 U.S. at 589. Under the regime of Eugene "Bull" Connor the streets of Birmingham were "open to some views," but not open to all. The ordinance as applied denied equal protection.

3. *Improper Exclusion of Evidence on the Unconstitutional Application of §1159.*

Petitioners' various proffers of evidence which the trial court refused to hear demonstrate even more conclusively that the ordinance was not fair in its application. Indeed, petitioners offered to prove that the procedure specified by §1159 was never followed, that the city commission never issued permits under §1159 and that this function customarily was performed by the City Clerk at the request of the Traffic Department without any statutory authority (R. 344-354). It was established that there were no published rules or regulations other than §1159 (R. 350). However, the trial court would not permit witnesses to answer whether the city commission had *ever* voted on issuance of permits (R. 347).

If the Court should believe that the evidence is insufficient to establish an unconstitutional administration of the ordinance, petitioners are at the least entitled to an opportunity to prove the facts at a new hearing. The trial court's conclusion that there was an "absence of a showing of arbitrary and capricious action upon the part of

the Commission of the City of Birmingham in denying the defendants a permit to conduct a parade on the streets . . ." was patently erroneous in view of the refusal to hear evidence on the subject. The exclusion of such evidence was in itself a denial of due process of law to petitioners. Cf. *Coleman* v. *Alabama*, 377 U.S. 129, 133; *Carter* v. *Texas*, 177 U.S. 442, 448-449.

B. *The conviction denied due process because there was no evidence petitioners participated in a forbidden "unlawful" parade or demonstration.*

This Court has made it plain in *Thompson* v. *Louisville*, 362 U.S. 199, and in subsequent cases applying its rule, that a conviction where there is no evidence of guilt denies due process. See *Garner* v. *Louisiana*, 368 U.S. 157; *Fields* v. *City of Fairfield*, 375 U.S. 248; *Taylor* v. *Louisiana*, 370 *U.S.* 154; *Barr* v. *City of Columbia*, 378 U.S. 146; *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 93-95. *Fields* v. *Fairfield*, *supra*, makes clear that this applies as much to a contempt prosecution as to other criminal charges. In such cases the Court has ascertained the elements of criminality and examined the record to determine if there was *any* evidence of guilt. Here petitioners were enjoined against "unlawful" parades in violation of the Birmingham parade ordinance. To sustain a conviction, the State was bound to prove that petitioners knowingly participated in an "unlawful" parade.

There was no proof that the parades were unlawful. The arguments set forth in Part IA, above, pp. 25 to 29, demonstrate the invalidity of the permit requirement of §1159 on its face and as applied, as well as the vagueness of the injunction against "unlawful" parades and demonstrations. And, of course, there was no evidence, and there could have been no evidence, that petitioners *knew* the

demonstrations were unlawful. There has never been any suggestion that the parades were unlawful except by reference to the permit requirement of section 1159. The constitutional invalidity of that provision undermines any possible claim that the petitioners knowingly violated the injunction's prohibition against "unlawful" parades.

Neither was there any evidence that petitioners participated in any parade for which a permit was required under §1159. The Alabama judicial construction of §1159 as applied to the very same Good Friday events involved in this case is that the mere presence of a group walking together on the sidewalks, obeying traffic regulations and not walking on the roadway does not require a permit. *Shuttlesworth* v. *City of Birmingham,* ..... Ala. App. ..... , 180 So.2d 114, 139 (1965) (pending on certiorari). Judge Cates concluded that the proof "fails to show a procession which would require, under the terms of §1159, the getting of a permit."

The same conclusion follows with respect to petitioners who participated in the Easter Sunday march. They, too, were walking on the sidewalks, and obeyed traffic signals. On both occasions police blocked off traffic and had large numbers of officers present and in control of spectators whom the police permitted to gather. And on both occasions members of the crowd of spectators followed the people who came out of the church. The conviction is based on no evidence of guilt because there was no prohibited "unlawful" parade, and no parade in violation of the permit requirement of §1159 as construed by the Alabama Court of Appeals.

The Alabama Supreme Court relies upon a supposed admission in petitioners' brief in the court below (18a-19a). The brief said only that after the injunction peti-

tioners continued their participation in "protest demonstration." There was no admission that petitioners participated in a prohibited *"unlawful"* parade or demonstration or that they violated a valid permit requirement. To the contrary, petitioners' brief argued at length that their conduct was constitutionally protected and that there was no evidence of their guilt under the doctrine of *Thompson* v. *Louisville,* 362 U.S. 199.

If the Court should determine that there was no evidence that petitioners violated the injunction, it will be unnecessary to decide whether a court may validly punish violation of an unconstitutional *ex parte* injunction. *Fields* v. *City of Fairfield,* 375 U.S. 248.

II.

Assuming *arguendo* that petitioners did disobey the injunction, Alabama may not validly punish them because the *ex parte* injunction was void as an unconstitutional infringement of their rights to free speech and assembly.

The opinion of the Alabama Supreme Court holds that *United States* v. *United Mine Workers,* 330 U.S. 258, permits punishment by criminal contempt for the violation of an *ex parte* injunction without regard to the constitutionality of the injunctive decree. Indeed, the court below (unlike the court in *Mine Workers*) did not even discuss whether or not the injunctive order was valid.

The case thus presents the grave question, whether citizens may be jailed for disobeying an *ex parte* injunctive order which violates their constitutionally protected rights to free speech, peaceable assembly and petition for the redress of grievances. This is a question of paramount

importance. Its decision may well determine whether the First Amendment freedoms will have continued vitality.

This Court recognized the gravity of this question by granting certiorari in a similar Alabama case and inviting the United States to participate and argue the cause orally as *amicus curiae*. *Fields* v. *City of Fairfield*, 375 U.S. 248. In *Fields*, the court found it unnecessary to decide this issue which had been thoroughly briefed and argued.[14] More recently, in *Donovan* v. *Dallas*, 377 U.S. 408, 414, involving the power of states to deny access to the federal courts, the Court expressly declined to pass on whether disobedience of an invalid order could be punished, because the issue had not been previously considered by the state court. We read the *Donovan* case as at least a partial confirmation of our view, urged in detail below, that the question is not foreclosed by *Mine Workers, supra*.

First Amendment freedoms can be destroyed if citizens may be punished for disobeying *ex parte* injunctive decrees which violate the First Amendment. The proposition is so plain that it requires no elaborate analysis to demonstrate its validity. Plainly, some courts will use the injunctive power to suppress free expression of unpopular ideas.[15]

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[14] *Fields* v. *City of Fairfield*, No. 30, Oct. Term, 1963, Brief for Appellants, pp. 21-36; Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc. as *amicus curiae* urging reversal, passim; Brief for the United States as *amicus curiae* urging reversal, pp. 11-13. The United States pointed out in its brief (at pp. 12-13, n. 19):

> It is, of course, well settled that failure to apply for a permit under a licensing statute does not bar a subsequent attack on its constitutionality. Smith v. Cahoon, 283 U.S. 553; Lovell v. Griffin, 303 U.S. 444; Staub v. City of Baxley, 355 U.S. 313. By a parity of reasoning, it may be argued that one should not be compelled to apply for the dissolution of a plainly invalid judicial decree in order to preserve the question of its constitutionality upon conviction for disobeying it.

[15] See for example *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; id., 360 U.S. 240; id., 377 U.S. 288; *Congress of Racial Equality* v. *Douglas*, 318 F.2d 95 (5th Cir. 1963).

Plainly, the power to enforce unconstitutional law is the power to govern unconstitutionally. We do not believe that the power of courts to defend their dignity requires or permits the power to destroy or "whittle away" the First Amendment. Cf. *Re Oliver*, 333 U.S. 257, 278.

The *Mine Workers'* decision should be distinguished, limited to its non-constitutional context, or overruled. The result in *Mine Workers* did not depend on the view that void orders must be obeyed, because five members of the Court held the injunction valid.[16] There was no claim in *Mine Workers* that the injunctive order was unconstitutional or affected free speech rights; the possible application of the rule against disobeying invalid orders to constitutional claims was discussed only by the dissenters (330 U.S. at 352). The principal precedent relied on for the *Mine Workers* rule (*United States* v. *Shipp*, 203 U.S. 563),[17] was a case where the judicial order was plainly valid, and where there was no tenable claim that the court order violated the contemnor's First Amendment or other constitutional rights.

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[16] In *United States* v. *United Mine Workers*, 330 U.S. 258, the opinion of the Court, by Chief Justice Vinson (joined by Justices Reed and Burton) held the injunction valid and stated as an alternative ground that disobedience of non-frivolous orders could be punished. Justices Black and Douglas concurred, solely on the ground that the injunction was valid without deciding whether violation of void orders might be punished. Justices Jackson and Frankfurter held the order invalid but agreed with C. J. Vinson and Justices Reed and Burton that invalid orders could be enforced by criminal contempt. Justices Murphy and Rutledge dissented on the ground that the order was invalid and that invalid orders might not be enforced by contempt.

Thus, the contempt judgment was affirmed by a 7-2 vote. Five justices thought the order valid, four thought it invalid. Five thought invalid orders might be enforced by contempt; two justices disagreed; and two expressed no view.

[17] *Worden* v. *Searls*, 121 U.S. 14, also cited in *Mine Workers*, was not a criminal contempt case.

This Court has said that "First Amendment freedoms need breathing space to survive." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433. A "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. See *Near* v. *Minnesota*, 283 U.S. 697; *Thomas* v. *Collins*, 323 U.S. 516; *Freedman* v. *Maryland*, 380 U.S. 51. *Ex parte* injunctive orders restraining free expression without any adversary contest of factual or legal issues determinative of constitutional claims, impose prior restraints totally devastating to the right of free expression. They should be treated with the same suspicion accorded to administrative prior restraints. Cf. *Freedman* v. *Maryland*, 380 U.S. 51, 57-59. A rule that forbids challenge of *ex parte* injunctions in contempt proceedings, despite their unconstitutionality, creates a prior restraint effectively immunized from challenge.

The undeniable effect of the rule stated by the court below is to permit the states to jail persons for acts protected by the Constitution. In other contexts this Court has recognized that both direct and indirect state efforts to render constitutional rights ineffective must be prevented whatever the form of the state action. Compare *Barrows* v. *Jackson*, 346 U.S. 249, with *Shelley* v. *Kraemer*, 334 U.S. 1. And see, *Cooper* v. *Aaron*, 358 U.S. 1, 17, and cases cited.

It is argued in support of the result reached below that the principle stated is necessary in aid of respect for the courts and to preserve the rule of law through orderly judicial processes. A variety of decisions of this Court (both before and after *Mine Workers, supra*) demonstrate that this is not sound. In such cases as *Johnson* v. *Virginia*, 373 U.S. 61 (courtroom segregation), and *Hamilton* v *Alabama*, 376 U.S. 650 (witness ordered to testify despite racially discriminatory form of address), this Court re-

jected arguments that a judge's orders, like those of a ship's captain, must be obeyed whether right or wrong. See also, *George* v. *Clemmons,* 373 U.S. 241 (courtroom segregation). And where a judge improperly ordered a witness to surrender his privilege against self-incrimination, the Court reversed a contempt conviction notwithstanding the affront to the Court's dignity. *Stevens* v. *Marks,* 383 U.S. 234. See also *Re Oliver,* 333 U.S. 257, 278. The only difference between those cases and this one is that here the court order is labeled "injunction." Mere labels should not determine basic constitutional rights. *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429.

Thomas v. *Collins,* 323 U.S. 516, was similiar to this case. There was no suggestion that disobedience of the invalid order required punishment notwithstanding the infringement of constitutional rights. And see the pre-*Mine Workers* cases holding that no penalty could be imposed for disregard of void orders. *Ex parte Sawyer,* 124 U.S. 200; *Ex parte Fisk,* 113 U.S. 713; *Ex parte Rowland,* 104 U.S. 604.

In the 19 years since *Mine Workers* this Court has not applied its principle to enforce a void decree by criminal contempt. Indeed, it has been distinguished or ignored in the context of labor disputes where no constitutional claims were tendered. *Mine Workers* was not mentioned at all in *United Gas, Coke and Chemical Workers* v. *Wisconsin Employment Relations Bd.,* 340 U.S. 383, when the Court reversed contempt convictions on the ground that the injunction disobeyed was void because of federal preemption. In *Re Green,* 369 U.S. 689, the Court explicitly distinguished *Mine Workers* and reversed a contempt conviction where the injunction was void because Congress preempted the field. *Re Green, supra,* leads, *a fortiori,* to the conclusion

that an inhibition on state judicial power of *constitutional* (as opposed to statutory) dimension renders an injunction equally void.

Certainly this issue, which is so vital to the enjoyment of First Amendment rights, cannot turn solely on the basis of local practice or procedure. Punishment under an unconstitutional injunction presents a constitutional question for this Court to decide apart from any issue of Alabama procedure. Cf. *Davis* v. *Wechsler,* 263 U.S. 22, 24; *Wright* v. *Georgia,* 373 U.S. 284; *NAACP* v. *Alabama,* 357 U.S. 449; *NAACP* v. *Alabama,* 377 U.S. 288.

We submit that a doctrine compelling obedience to a lawless judicial order will do more to promote disrespect for law than a contrary rule. Mr. Justice Black wrote in *Re Oliver,* 333 U.S. 257, 278:

> The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of "demoralization of the court's authority."

The right of free expression is equally precious, as were the rights involved in *Johnson* v. *Virginia, supra;* and *Stevens* v. *Marks, supra.* Citizens are entitled to conduct their affairs on the basis of the law of the Constitution as declared by the highest Court of the land. When they in good faith disobey the orders of lower tribunals on the ground that such orders are inconsistent with the Constitution, they must run the risk of punishment if they are wrong. But, they should not be punished when they are right. Our law has long permitted citizens assumed guilty of violating a valid law to go free when subsequent changes of law effectively repeal the criminal provisions involved. *United States* v. *Chambers,* 291 U.S. 217; *Hamm* v. *Rock Hill,* 379 U.S. 306. The law can certainly tolerate freeing

those who are finally determined to have engaged in constitutionally protected activities in the face of an invalid *ex parte* injunction.

III.

Petitioners King, Abernathy, Walker and Shuttlesworth may not be punished for their Constitutionally Protected statements to the press criticizing the injunction and Alabama officials.

The trial court's judgment of contempt seemingly rests in part upon the ground that statements and news releases by some of the petitioners contained derogatory statements about the Alabama courts and the injunctive order. However, the matter is not entirely clear. There is certainly no indication that the punishment, or any part of it, was imposed *solely* because of allegedly derogatory statements. If petitioners prevail with the arguments in Parts I and II above, it may be unnecessary for the Court to pass upon the claims made in this part. See *Re Sawyer,* 360 U.S. 622, 636-638.

However, petitioners were found generally guilty of contempt under an accusation relying on the alleged derogatory remarks, and the trial court did consider and give some weight to this evidence. Thus, the conviction must be reversed if this or any of the charges is constitutionally vulnerable. This result is required by the settled principles enunciated in *Thomas* v. *Collins,* 323 U.S. 516, 529; *Stromberg* v. *California,* 283 U.S. 369, 367-368; *Williams* v. *North Carolina,* 317 U.S. 287, 291-293. "The judgment must be affirmed as to both [charges] or as to neither." *Thomas* v. *Collins, supra,* 323 U.S. at 529.

The role played by the charge of disrespectful remarks requires some explanation. The City's petition for a show

cause order charged petitioners Walker, Martin L. King, Shuttlesworth and Abernathy with contempt on the basis of the April 11, press release (quoted in the opinion below, 11a-12a).[18] On April 15, Judge Jenkins ordered petitioners Walker, Abernathy, Shuttlesworth and M. L. King, Jr. to show cause why they should not be punished for contempt "unless they shall publicly retract or recant the statements made publicly at press conference and mass meeting on April 11, 1963, or their intention to violate the injunction . . . " (R. 46).

At trial the State put on evidence about the press conference, introduced the press release, and evidence that King read the statement and that Shuttlesworth reaffirmed the matter contained in the release (R. 305-310; 482-483). The City also proved that when Shuttlesworth was served with the injunction in the middle of the night he said, "This is a flagrant denial of our constitutional privileges" (R. 249). This and similar evidence was summarized and quoted by the Alabama Supreme Court (opinion below, *infra* 10a-15a).

During the trial the court said the press conference and the two marches were the grounds for the contempt charge (R. 360). Petitioners' counsel, cognizant of the demand for a retraction, offered a statement explaining petitioners' position (R. 421-423; 486-487); the Court rejected it as not "in any way purging the contempt" (R. 423).

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[18] It was alleged that the statement "constitutes an open, defiant repeated and continuing day by day contempt of this court and contempt of said injunction, and said contempt is continued and repeated each day until said respondents shall publicly recant or retract same by announcement by said respondents so recanting or retracting same with similar or equal press, radio and T.V. coverage as when said statements were made" (R. 42).

The trial court opinion noted that the petition "charges the violating of the Court's order granting the temporary injunction by their issuance of a press release . . . which release allegedly contained derogatory statements concerning Alabama Courts and the injunctive order of this Court in particular" (1a, *infra*). The court went on to find generally that "the actions" (without further specification) of petitioners were "obvious acts of contempt, constituting deliberate and blatant denials of the authority of this Court and its order" (4a, *infra*), and noted that petitioners had given "no apology" (5a, *infra*). The Alabama Supreme Court opinion recites the evidence but does not specifically rely upon anything other than the two marches to sustain the judgment.

To the extent that the contempt judgment was based on the alleged derogation of the court by petitioners' press release and statements, it plainly violates First Amendment rights. *Garrison* v. *Louisiana*, 379 U.S. 64; *New York Times Co.* v. *Sullivan*, 376 U.S. 254; *Wood* v. *Georgia*, 370 U.S. 375; *Bridges* v. *California*, 314 U.S. 252; *Pennekamp* v. *Florida*, 328 U.S. 331; *Craig* v. *Harney*, 331 U.S. 367; cf. *Holt* v. *Virginia*, 381 U.S. 131 (attorney's criticism); *Re Sawyer*, 360 U.S. 622 (attorney's criticism). Mr. Justice Brennan wrote in *Garrison, supra*, 379 U.S. at 74-75:

> For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S., at 270.

Petitioners' statement (reprinted *infra* 11a-12a) criticized Alabama officials for perpetuating segregation and defying the desegregation decisions of this Court and asserted that the injunction was an "unjust, undemocratic and unconstitutional misuse of the legal process" (11a-12a). Neither of the courts below made any findings or conclusions appraising this statement in accord with the standards set down in *Craig,* supra; *Bridges, supra; Pennekamp, supra;* and *Wood, supra.* Nor was there any finding, or effort to prove, that the statements were false or malicious under the standards of *Garrison, supra.*

Petitioners had a right under the First Amendment to say that the injunction was unconstitutional, unjust and a violation of their rights, and that Alabama officials were working to support segregation. They were surely free to say that the judge was wrong on his law. *Craig* v. *Harney,* 331 U.S. 367, 375-377. As Mr. Justice Brennan wrote in *Re Sawyer,* 360 U.S. 622, 735 "[d]issenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed." The Alabama official governmental attitude toward desegregation and civil rights organizations is a matter of common repute and well known to this Court. See the history of litigation set forth in Mr. Justice Harlan's opinion in *N.A.A.C.P.* v. *Alabama,* 377 U.S. 288. Petitioners' assertion that the law enforcement officials of Birmingham were discriminating against them made basically the same point that was made by the Alabama Court of Appeals holding that the administration of City Code §1159 was discriminatory and unconstitutional. *Shuttlesworth* v. *Birmingham,* ..... Ala. App. ....., 180 So.2d 114 (1965).

IV.

The conviction of petitioners J. W. Hayes and T. L. Fisher denied them due process because there was no evidence that they had notice of or knowledge of the terms of the injunction.

The conclusion of the court below that petitioners Hayes and Fisher had knowledge of the terms of the injunction is plain error. There is no evidence to support that conclusion. There obviously could be no punishable violation of an order by one who had no knowledge of its prohibitions. *Thomas* v. *Louisville,* 362 U.S. 199; *Lanzetta* v. *New Jersey,* 306 U.S. 451.

Petitioners Hayes and Fisher were not named as parties to the bill of injunction and were not named in the injunctive order. This was flatly acknowledged in the City's petition for a show cause order (R. 38). Both Hayes and Fisher were alleged to have violated the injunction by participating in the march on Easter Sunday, April 14, 1963. They were not served with copies of the injunctive order until after their alleged violation of it.[19]

The court below concluded that Rev. Fisher knew of the injunction based upon his own testimony. The court mentions that he had attended church meetings on Friday and Saturday, but there was no indication how this had any probative value with respect to knowledge of the injunction. The opinion then quotes some of Fisher's testimony on

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[19] Hayes acknowledged being served on April 16 (R. 397). Fisher acknowledged receiving the contempt citation but said he never was served with the injunction (R. 362). The court below stated that Hayes and Fisher were not served "until after the Sunday March" (opinion below 27a, *infra*).

cross examination; we set out in the margin the entire series of questions and answers.[20]

This testimony shows that Fisher did not admit knowledge of the terms of the injunction. He specifically denied understanding the order. He also denied reading about it in the newspapers (R. 370-371). Testimony that he was told that he probably would go to jail if he marched implies no knowledge of the terms of the injunction since the marchers were arrested under §1159 of the City Code and not the injunction. The State offered no proof of its own tending to show that Fisher had knowledge of the injunction.

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[20] "Q. What did you hear about the injunction? What did they tell you about it? A. I only heard about the injunction. It wasn't interpreted to me.

Q. Was it interpreted to you you would probably have to go to jail if you took part in that march or walk? A. Yes, but I didn't see any reason I would have to go.

Q. I understand, but you were not told if you got in that march you would have to go to jail? A. I was told if I walked on the streets of Birmingham I would have to go to jail.

Q. I am talking about this Easter Sunday procession. That is what they were talking about? A. That's right.

Q. And you were told that you would go to jail if you did, or probably would? A. I was never told that.

Q. You understood you would? A. Not for just walking on the streets of Birmingham.

Q. You mean for walking in this procession you didn't understand you would be arrested? A. I didn't understand I would be arrested for walking.

Q. You didn't understand you would be arrested for walking? A. I can't understand it yet.

Q. You didn't understand it then and you don't understand it now? A. That's right.

Q. All right, did anybody say anything to you about who was included in the injunction? A. After I was confined and after the contempt I read it.

Q. You have read the contempt? A. That's right, but I haven't read the injunction yet.

Q. When did you hear about the injunction? A. When did I hear about the injunction?

Q. Yes, not the contempt but the injunction? A. I think I told the detective that interviewed me that I heard about an injunction, about an injunction, not any particular injunction" (R. 368-369).

As to petitioner Hayes, the court below concluded he had knowledge of the injunction on testimony by Detective Harry Jones that he asked Hayes about the injunction, that Hayes said he knew of it; and that he was marching in the face of it anyway; that he was doing it for human dignity (R. 315). Hayes acknowledged that he told the detective that he had heard about the injunction (R. 402), and stated that he had heard about the injunction on Good Friday on TV (R. 402). He said, "I just heard this news flash that an injunction had been issued against demonstrators in Birmingham" (R. 403). He said that he did not inquire about the injunction "because I had not been enjoined" (R. 403-404). Thus, there was no evidence that Hayes had knowledge of what the injunction actually prohibited. There was no showing that he understood it or had an opportunity to understand it. He was exactly correct in thinking that "he" had not been enjoined for he was not a party to the injunction suit and had not been named in the injunction.

The finding that Hayes and Fisher clearly had knowledge of the order in such a way as to understand it, and that they committed a willful violation of it, rests only on speculation. This is no substitute for evidence. *Thompson* v. *Louisville*, 362 U.S. 199.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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